

Appl. No. 10/840,143  
Docket No. 9626  
Reply to Office Action mailed on April 14, 2010  
Customer No. 27752

## REMARKS

### Claim Status

Claims 1-4, 6-12 and 14-17 remain under consideration. Claims 3 and 12 have been amended to remove the “non-sedative antihistamines” term, as discussed under §112, below. No new matter has been introduced and entry of the amendments is requested.

### Rejection Under 35 USC §112

Claims 3 and 12 stand rejected under §112 since the broad term “antihistamines” necessarily encompasses the narrower term “non-sedative antihistamines.” The latter term has now been cancelled from the claims, without thereby narrowing the scope of either Claim 3 or Claim 12. Withdrawal of the rejections on this basis is requested.

### Rejection Under 35 USC §103(a)

All claims stand rejected under 35 USC §103(a) over the combined teachings of US 2003/013377 and WO 94/25008 in further view of the Kennedy publication, all for reasons of record at pages 5-10 of the office action.

Applicants respectfully traverse all rejections.

Before turning to the grounds for rejection, it is important to consider the availability of ‘377 as a publication that can even be properly cited against the present invention.

### Applicability of 35 USC §103(c)

In the previous responsive amendment, Applicants have asserted that the Dobrozsi US 2003/0113377 A1 Published Application is not available as a reference against the instant invention under §103(c).

In reply, the Examiner takes the position that ‘377 is available under §103(a) *via* §102(a), citing its publication date *vs.* the effective filing date of the present Application, (Office Action, page 10).

Applicants must respectfully disagree. The mere fact that the publication date of '377 is before the effective filing date herein is obviated by the fact that '377 belongs to what the MPEP calls "a new category of prior art". [MPEP 706.02(a) **B.**] Such "new category" relates to art that, together with the later Application under examination, was, at the time of the claimed invention was made, owned by, or subject to an obligation of assignment to, the same Assignee (here, The Procter & Gamble Company, as stated in the previous responsive Amendment).

Of course, this exception to the usual rules regarding printed publications may vanish under §102 (b), but only if the later Application is not filed before the one-year anniversary of such publication. This is not the case in the present circumstances, since the May 6, 2004, filing date herein is before the one-year anniversary of '377's publication date of June 19, 2003.

In short, Applicants submit that this matter falls within the explanatory chart at MPEP 706.02(k) Example 4, as follows:

**Example 4.** Assumption: Employees A and B work for C, each with knowledge of the other's work, and with obligation to assign inventions to C while employed. Employee B's application, which is pending on or after December 10, 2004, is being examined.

SITUATIONS	RESULTS
1. A invents X and files application.	This is permissible.
2. B modifies X to XY after A's application is filed. B files evidence establishing that A and B were both under obligation to assign inventions to C at the time the invention XY was made.	Provisional 35 U.S.C. *103 rejection > of B's claims based on provisional prior art under 35 U.S.C. 102(e) (A's application) <cannot be made; provisional double patenting rejection is made; no 35 U.S.C. **>103 rejection based on prior art under 35 U.S.C. 102(f) or 102(g) <made.
3. B files a terminal disclaimer under 37 CFR 1.321(c).	The provisional double patenting rejection made in B's application would be obviated if all requirements of 37 CFR 1.321 are met.

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Accordingly, while a Provisional Double Patenting rejection might be in order, the provisions of 35USC 103(c) clearly apply in the present circumstances.

In summary, it continues to be Applicants' position that '377 falls in the category of publications that are not citable against the present invention under the provisions of 35 USC 103(c), per the American Inventors Protection Act of 1999.

Rejections Under 35 USC §103

All previous arguments made in support of patentability continue to apply. However, inasmuch as the rejections of 4/14/10 have been made over the combination of '377/WO 008/Kennedy and since '377 is not properly citable, as discussed above, reconsideration and withdrawal of the rejections on this basis are rejected.

Early and favorable action in the case is requested.

In the event there are questions regarding this Amendment, the Examiner is invited to call Applicants' Attorney, Ms. Kelly McDow, at 513-983-3798.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY

By

  
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